Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

VINCENT FEDERICO,
Petitioner

v.

PAUL DIPAOLO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should the new AEDPA requirements on second habeas corpus petitions be applied retroactively to a state petitioner whose first habeas corpus petition was filed before AEDPA was enacted?

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OPINION BELOW

The opinion of the First Circuit is not reported, but appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit entered on April 8, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The petitioner is aware of 28 U.S.C. §2244(3)(E) but argues that its application to him would have impermissible retroactive effect.

THE STATUTORY PROVISION INVOLVED

28 U.S.C. §2244 provides:

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or

(B)(i) the factual predicate for the

claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30

days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the

writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review:

(B) the date on which the impediment to filing an application created by State action violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioner, together with two codefendants, was indicted by a Massachusetts grand jury on April 20, 1978, for murder. A jury convicted petitioner of second-degree murder on December 22, 1978, and the court (McGuire, J.) sentenced him to life imprisonment. Codefendant Thomas Casale was also convicted of second-degree murder; codefendant Joseph Bruno received a directed verdict of acquittal from the trial court after the jury convicted him of second degree murder. The Massachusetts Supreme Judicial Court affirmed the petitioner's and Casale's convictions on July 17, 1980. *See Commonwealth v. Casale*, 381 Mass. 167 (1980). Petitioner unsuccessfully pursued a motion for new

trial through the state courts in 1982 through 1983.

Petitioner and Casale filed a joint federal habeas corpus petition in 1985. The district court denied the petition on February 17, 1987, *Casale v. Fair*, 653 F.Supp. 856 (D.Mass. 1987), and the First Circuit affirmed the denial of the petition on November 18, 1987, *Casale v. Fair*, 833 F.2d 386 (1st Cir. 1987).

Petitioner filed his second motion for new trial in state court in 1993. Included with that motion was the affidavit of codefendant Casale, who admitted he was the shooter and exculpated the petitioner. Since the original trial judge was not available, a new judge (Hamlin, J.) heard the motion. Without holding an evidentiary

hearing, she denied the motion on February 8, 1996. The Massachusetts Appeals Court affirmed the denial of the new trial motion in an unpublished decision on July 1, 1997. The Supreme Judicial Court denied the petitioner's application for further appellate review on September 3, 1997.

The petitioner then sought leave to file a second habeas corpus petition in the First Circuit pursuant to 28 U.S.C. §2244. The petitioner argued to the First Circuit that he was entitled to file his habeas corpus petition pursuant to 28 U.S.C. §2254, and that the application of the new provisions in 28 U.S.C. §2244 to his case would have an impermissible retroactive effect. In an unpublished order, the First Circuit denied the petitioner leave to file

his habeas corpus petition in the district court.

REASONS WHY THE WRIT SHOULD BE GRANTED

When Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA"), it codified a standard for abuse of the writ by a state petitioner claiming actual innocence as a procedural gateway to have an otherwise barred constitutional claim considered on the merits. *See* 28 U.S.C. §2244(b)(2)(B):

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> (A) . . . .; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a

> whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Prior to this legislation, the standard was a matter of case law. In *Schlup v. Delo*, 115 S.Ct. 851 (1995), this Court spelled out the standard to be applied and the method of application. Adopting the *Carrier* standard and rejecting the *Sawyer* standard (clear and convincing evidence) for claims of actual innocence asserted to void procedural barriers, this Court held that a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. It is clear that Congress reversed the *Schlup* Court's

rejection of the *Sawyer* standard and reimposed it; the next question then becomes whether the legislation changes any other aspect of *Schlup*. Is "the claim" in §2244(b)(2)(B)(i) the claim of actual innocence, or is "the claim" the underlying constitutional error? In the former case, the "new" evidence of innocence requirement of *Schlup* remains basically unchanged. In the latter case, a procedural hurdle not suggested in *Schlup* will have been imposed; a hurdle which will block many litigants not blocked by *Schlup*. In the case at bar, the respondent argued in his pleadings to the First Circuit that Congress eliminated this aspect of *Schlup* also. Although the First Circuit's opinion here is not that clear, it applied some new AEDPA standard,

and found no impermissible retroactive effect.

It is the petitioner's position that the new restrictions in AEDPA should not be applied to him.

Applying AEDPA's new restrictions[1] to his case would "attach [ ] new legal consequences to events completed before its enactment," and would thus have impermissible retroactive effect. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994). This basic argument has been accepted by the Sixth Circuit. *See In re Hanserd*, 123 F.3d 922 (6th Cir. 1997).

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1 The new restrictions include the new actual innocence standard, the gatekeeper requirements of first filing in the circuit, and the removal of the right to ask for rehearing or petition for certiorari.

When this applicant filed his initial §2254 petition, the law would have allowed him to raise the claims raised here in a second petition. Under AEDPA, that apparently is not so. Applying the new statute would thus attach severe new legal consequences to his having filed a first habeas petition. Because Congress has not expressed an intent that the new Act have such a retroactive effect, it should not be applied in this way. *See id.* at 931.

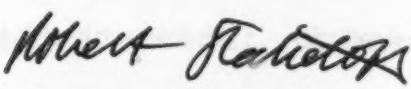
Whether or not the AEDPA restrictions on second habeas corpus petitions should be given retroactive effect is an important question of federal law that should be settled by this Court. The Circuits are in disarray on this issue. See discussion in *United States v. Ortiz*, 136 F.3d 161, 165-

66 (D.C. Cir. 1998).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 98-8010

VINCENT FEDERICO,
Petitioner,

v.

PAUL DIPAOLO,
Respondent.

Before

Torruella, Chief Judge,
Selya and Stahl, Circuit Judges.

ORDER OF COURT

Entered April 8, 1998

Petitioner Federico seeks authorization from this court to file a second habeas corpus petition seeking relief from his conviction for second degree murder. We deny his application.

Federico has failed to make out a

prima facie showing that he satisfies either of the statutory prerequisites for filing a successive petition contained in 28 U.S.C. §2244(b)(2). On the one hand, he has not shown that any claim he makes of alleged legal errors at his trial "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2244(b)(2)(A). On the other, the proffered affidavit of a codefendant, weak evidence in itself, see Dirring v. United States, 353 F.2d 519, 520 (1st Cir. 1965), and found by the state court to be unreliable, is insufficient to make a prima facie showing that, if such evidence had been introduced at trial, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. §2244(b)(2)(B)(ii).

Finally, we find no impermissible retroactive effect in the application of the Antiterrorism and Death Penalty Act of 1996 to the instant case.

The application to file a second habeas corpus petition is denied.

By The Court

PHOEBE MORSE, Clerk

(2)

OCT 19 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-94

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VINCENT FEDERICO, ***Petitioner,***

v.

PAUL DIPAOLO, Superintendent of M.C.I. Shirley, ***Respondent.***

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Issues Presented

1. Whether this Court has jurisdiction to entertain a petition for a writ of certiorari to review the exercise by the court of appeals of its "gatekeeping" function with respect to a state prisoner's second habeas corpus petition, where 28 U.S.C. § 2244(b)(3)(E) specifically provides that such decisions "shall not be the subject of a petition . . . for a writ of certiorari"?

2. Whether granting certiorari is appropriate, where the petition is based on an insubstantial claim of actual innocence?

3. Whether the AEDPA's standard for second or successive habeas corpus petitions works an impermissible retroactive effect as to a petitioner who filed his first habeas petition before the AEDPA was passed?

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No. 98-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VINCENT FEDERICO, *Petitioner*,

v.

PAUL DIPAOLO, Superintendent of
M.C.I. Shirley, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Paul DiPaolo, the Superintendent of the Massachusetts Correctional Institution, Shirley, respectfully requests that this Court deny the petition for writ of certiorari.

Opinions Below

Petitioner Vincent Federico's conviction for second-degree murder was affirmed by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Casale*, 381 Mass. 167, 408 N.E.2d 841 (1980). The United States District Court for the District of Massachusetts denied his first petition for a writ of habeas corpus in *Casale* v. *Fair*, 653 F. Supp. 856 (D. Mass. 1987), and the United States Court of Appeals for the First Circuit affirmed the denial of habeas relief in *Casale* v. *Fair*, 833 F.2d 386 (1st Cir. 1987).

The courts of Massachusetts denied petitioner's collateral attacks on his conviction in a series of unpublished decisions. The First Circuit denied petitioner's application for authorization to file a second habeas petition in the district court in an unpublished decision, which is reproduced at the back of the Petition for Writ of Certiorari (hereinafter "Petition").

Statement of the Case [1]

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Petitioner seeks a writ of certiorari to the Court of Appeals for the First Circuit to review its denial of his motion for authorization to file his second habeas corpus petition.

Together with two co-defendants, petitioner was indicted by a Suffolk County, Massachusetts, grand jury on April 20, 1978, for the murder of Robert McFarlane. A jury convicted petitioner of second-degree murder on December 22, 1978, and the court (McGuire, J.) sentenced him to life imprisonment. Co-defendant Thomas Casale was also convicted of second-degree murder, and co-defendant Joseph Bruno received a directed verdict of acquittal. The Massachusetts Supreme Judicial Court affirmed the convictions on July 17, 1980. Petitioner unsuccessfully pursued a motion for new trial through the state courts in 1982 through 1983.

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[1] The facts supporting respondent's statement of the case are taken from the decision of the Supreme Judicial Court, *Casale*, 381 Mass. at 168-71, 408 N.E.2d at 843-44, from the decision of the First Circuit, *Casale*, 833 F.2d at 388, and from the materials included in the appendix of documents filed by petitioner in the First Circuit in support of his application for permission to file the second petition.

Petitioner and Casale filed a joint federal habeas corpus petition in 1985, which the district court denied on February 17, 1987. The First Circuit affirmed the denial of the petition on November 18, 1987.

Petitioner filed his second motion for new trial in state court in 1993. The Superior Court (Hamlin, J.) denied the motion on February 8, 1996, the Massachusetts Appeals Court affirmed the denial of the new trial motion on July 1, 1997, and the Supreme Judicial Court denied petitioner's application for further appellate review on September 3, 1997.

On March 13, 1998, petitioner sought authorization from the First Circuit to file his second habeas corpus petition. The second petition alleges that the trial judge's instructions on consciousness of guilt and joint venture in his 1978 trial were erroneous, that petitioner was prejudiced by being required to sit in the prisoner's dock during trial, and that his waiver of his right to testify at trial was invalid. The First Circuit on April 8, 1998, denied authorization to file the second petition.

II. FACTS

On Sunday morning, November 6, 1977, a group of five individuals were moving the belongings of an occupant of petitioner's apartment building in the North End of Boston out of the building and into a van parked in front. Petitioner and Casale taunted, spat at, and interfered with the movers. After conversing with petitioner in the doorway of the nextdoor building, Casale left and returned with Bruno and two other men. Petitioner joined them, and after hesitating in front of the van, petitioner's group went to the playground across the street. Five shots erupted from the playground, killing one of the movers. Petitioner's group scattered. Minutes later, petitioner and Bruno were found together in a nearby bowling alley, and

Casale, seen running down another street, fled when a police officer spoke to him.

Petitioner's second motion for new trial, filed in 1993, included the affidavit of co-defendant Casale, who admitted he was the shooter and attempted to minimize petitioner's culpability. In his affidavit, having "decided that [he] should tell the whole story" in light of his upcoming parole hearing, Casale claimed that he fired all the shots "trying to scare the people who were moving," that he did so "spontaneous[ly]" out of "anger and stupidity." Casale said he "believe[d]" that petitioner and Bruno "were totally surprised by what [he] did."

Reasons for Denying the Writ

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN THE INSTANT PETITION FOR A WRIT OF CERTIORARI.

Petitioner seeks a writ of certiorari to review the First Circuit's denial of his motion for authorization to file his second habeas corpus petition in the district court. As provided in 28 U.S.C. § 2244(b)(3)(E), this Court has no jurisdiction to entertain this petition.

Section 106(b) of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, 1220-21 ("AEDPA"), delineates the circumstances under which a person in custody pursuant to the judgment of a state court may challenge that judgment in a second or successive habeas corpus petition:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(1)-(2). "The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996).

The AEDPA further provides a "gatekeeper" mechanism for the filing of second or successive habeas petitions in the district court. *Id.* at 662. Before a petitioner

may file a second or successive petition, he must first file a motion for authorization to do so from a three-judge panel of the court of appeals. 28 U.S.C. § 2244(b)(3)(A)-(B). The court of appeals may authorize filing of a second or successive petition only if the application makes a prima facie showing that it satisfies § 2244(b)(2). *Id.* § 2244(b)(3)(C).

Finally, Congress provided that the decision of the court of appeals to authorize or not to authorize the filing of a second or successive petition is not appealable, by petition for writ of certiorari or otherwise:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. §§ 2244(b)(3)(E). As stated repeatedly in *Felker*, 518 U.S. at 658-61, this provision unambiguously deprives this court of jurisdiction over certiorari petitions such as this one.

The provision that this Court has no jurisdiction in this case can and must be applied to petitioner. Petitioner is "aware" of this provision, but asserts without any justification whatsoever[2] that "its application to him would have impermissible retroactive effect." Petition at 1. This contention is unwarranted. This Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 274 (1994). *See, e.g., Bruner* v. *United States*, 343

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[2] The argument section of the petition discusses only the standard for second or successive petitions, not the jurisdiction-ousting provision, of the AEDPA.

U.S. 112, 116-17 (1952) (Court has "consistently" adhered to rule that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"), and cases cited. *See also Lindh* v. *Murphy*, 521 U.S. 320, ___, 117 S. Ct. 2059, 2071 & n.3 (1997) (Rehnquist, C.J., dissenting) (discussing Court's "longstanding practice of applying jurisdiction-ousting statutes to pending cases").

One of the earliest cases to apply this rule was *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), involving an appeal from the denial of a petition for writ of habeas corpus from the Circuit Court of the Southern District of Mississippi. While the appeal was pending in this Court, Congress repealed the act that gave this Court jurisdiction to hear appeals from judgments of the circuit courts. *Id.* at 508. Finding that Congress had the power under the Constitution to make exceptions to its appellate jurisdiction, *id.* at 514, this Court concluded it had no choice but to dismiss the appeal for want of jurisdiction, *id.* at 515. A rule depriving this Court of certiorari jurisdiction is no different.

Jurisdictional rules have no "retroactive" effect because they "'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat'l Bank of Miami* v. *United States,* 506 U.S. 80, 100 (1992) (Thomas, J. concurring)). In *Felker*, the Court held that § 2244(b)(3)(E) does not impermissibly limit its constitutional jurisdiction because the Court retains jurisdiction over habeas petitions filed as original matters. *Felker*, 518 U.S. at 661-62. Thus, the jurisdiction-ousting statute here affects only the manner and forum in which petitioner must litigate his second petition and does not affect his substantive rights. The statutory provision depriving the Court of jurisdiction over this matter requires dismissal of the petition.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE, GIVEN THE WEAKNESS OF PETITIONER'S ACTUAL INNOCENCE CLAIM, THE PETITION WOULD NOT HAVE SURVIVED DISMISSAL UNDER PRIOR LAW AS AN ABUSE OF THE WRIT.

Assuming *arguendo* that this Court may entertain the petition for a writ of certiorari, petitioner does not present facts sufficient to raise the issue of impermissible retroactive effect -- his second petition would have constituted an abuse of the writ even under pre-AEDPA standards.

Under this Court's precedents prior to the adoption of the AEDPA, a second or successive habeas petition would normally be dismissed as an abuse of the writ unless the habeas applicant could demonstrate "cause" for and "prejudice" from his failure to assert his claims in a prior petition. *McCleskey* v. *Zant*, 499 U.S. 467, 493-96 (1991). A petitioner unable to show cause and prejudice could nonetheless obtain habeas review of his claims under the narrow "fundamental miscarriage of justice" standard, *Schlup* v. *Delo*, 513 U.S. 298, 314-15 (1995); *McCleskey,* 499 U.S. at 494, that is, in "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime," *id.*

In *Schlup*, this Court held that a petitioner who has been sentenced to death who seeks to avoid a procedural bar by asserting a claim of actual innocence, must prove this claim under the "probably resulted" standard of *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986), rather than the more stringent "clear and convincing" standard of *Sawyer* v. *Whitley*, 505 U.S. 333, 336 (1992). *Schlup*, 513 U.S. at 326-27. Under the *Schlup-Carrier* standard, "[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no

reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327. Petitioner's claim that the AEDPA is impermissibly retroactive as to him depends on his assertion that his second petition would survive dismissal as an abuse of the writ under the *Schlup* actual innocence standard,[3] but would not survive dismissal under 28 U.S.C. § 2244(b)(2)(B)(ii). *See In re Hanserd*, 123 F.3d 922, 928-31 (6th Cir. 1997) (AEDPA retroactive because § 2255 petition could have satisfied the "cause" and "prejudice" standard of *McCleskey*, but could not survive dismissal under 28 U.S.C. §§ 2255(1)-(2), as amended).[4] *But see United States* v. *Ortiz*, 136 F.3d 161, 166 (D.C. Cir. 1998) (no retroactive effect where petitioner would have been unable to show prejudice under *McCleskey*).

Petitioner grossly overestimates the strength of his showing of actual innocence. The claim is based entirely on the affidavit of co-defendant Casale. However, the affidavit of

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[3] All of the claims alleged in petitioner's second petition -- that the trial judge's instructions on consciousness of guilt and joint venture in his 1978 trial were erroneous, that he was prejudiced by being required to sit in the prisoner's dock during trial, and that his waiver of his right to testify at trial was invalid -- were based on events at trial and were readily available to petitioner when he filed his first habeas petition in 1985. As petitioner cannot show "cause" under *McCleskey*, he instead relies on the "actual innocence" exception.

[4] In *Hanserd*, the petitioner's claim under *Bailey* v. *United States*, 516 U.S. 137 (1995), was not available when he filed the initial § 2255 petition because *Bailey*, which legalized the conduct for which Hanserd had been prosecuted, had yet to be decided. *Hanserd* is *sui generis*: *Bailey* applies only in federal, not state, prosecutions, and it presents a rare instance of a rule that qualifies under the first exception to the antiretroactivity rule of *Teague* v. *Lane*, 489 U.S. 288, 311 (1989). *See Bousley* v. *United States*, 118 S. Ct. 1604, 1610 (1998). Indeed, the Sixth Circuit subsequently stated that its holding in *Hanserd*, while not limited to *Bailey* claims, would apply in "few other cases." *In re Sonshine*, 132 F.3d 1133, 1135 (6th Cir. 1997) (per curiam).

a co-defendant who did not testify at trial inherently lacks credibility. *See Dirring* v. *United States*, 353 F.2d 519, 520 (1st Cir. 1965) (characterizing affidavit of co-defendant who did not testify at trial as "the weakest sort of evidence"). Indeed, the First Circuit's denial of authorization to file the second petition was based largely on the weakness of the Casale affidavit. *See* Petition at A-2. More important, in denying the second motion for new trial, the state-court motion judge specifically found that Casale's affidavit was neither "weighty or credible." This factual finding effectively negates petitioner's actual innocence claim -- to overcome it, he must rebut the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). In any event, it is improbable that a jury would have entertained any doubt about petitioner's guilt on the basis of his co-defendant's tardy assumption of responsibility.

Moreover, the affidavit is striking for what it fails to establish. Casale claimed to "believe" that his firing of his gun "surprised" petitioner, but, of course, Casale's testimony as to petitioner's state of mind is incompetent. Significantly, Casale did not claim that petitioner was unaware he was carrying a gun. In short, the affidavit does not seriously undermine the evidence that petitioner was present at the crime scene, knew that Casale had a gun, and shared with Casale the requisite state of mind, malice aforethought, for second-degree murder. Thus, even if the Casale affidavit were remotely reliable, it still fails to establish even a likelihood that no reasonable juror would have convicted the petitioner. Because the showing of actual innocence on which this petition depends is so insubstantial, certiorari is wholly inappropriate.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE AEDPA'S STANDARDS FOR SECOND OR SUCCESSIVE PETITIONS NEITHER GOVERN PAST CONDUCT NOR UPSET SETTLED EXPECTATIONS ABOUT THE ABUSE OF THE WRIT DOCTRINE.

Because the relevant conduct governed by the statute -- the filing of a second habeas corpus petition -- occurred in March of 1998, almost two years after its enactment, the question of the AEDPA's retroactive effect is a red herring. Congress intended for the non-capital provisions of the AEDPA to apply to cases filed after its enactment, *Lindh*, 521 U.S. at ___, 117 S. Ct. at 2063, 2068, and this is such a case. Indeed, this Court upheld the constitutionality of the AEDPA's provisions for second or successive habeas petitions in a case where, as here, the first and second petitions straddled the effective date. *Felker*, 518 U.S. at 655-56. *Felker* "is at least implicit authority for the proposition that the AEDPA amendments relating to second or successive applications do apply" in cases such as this. *In re Medina*, 109 F.3d 1556, 1562 (11th Cir. 1997). *Cf. Hatch* v. *Oklahoma*, 92 F.3d 1012, 1014 (10th Cir. 1996) (AEDPA rules for second or successive habeas petitions apply to second petition filed after effective date; no question of retroactive application under *Ex Post Facto* Clause because statute did not apply to events occurring before its enactment).

To torture his claim into the language of *Landgraf*, petitioner asserts that the relevant conduct affected by the AEDPA is not the filing of the current petition, which occurred after the effective date; rather, he argues that the statute has impermissible retroactive effect because it "attach[es] new legal consequences to an event completed before its enactment," the filing of his first petition. Petition at 14

(quoting *Landgraf*, 511 U.S. at 270). Even if the filing of the first petition were the relevant focus, the AEDPA's new provisions are not "retroactive" in the *Landgraf* sense.

Retroactive application of legislation is disfavored under "[e]lementary considerations of fairness," which dictate that "settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269. Whether a rule is "retroactive" requires evaluating "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. *See also id.* at 280 (rule is retroactive if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed").

In most cases considering whether the provisions at issue here have retroactive effect, the courts of appeal have required some showing that the petitioner actually and reasonably relied on the prior abuse of the writ standard to his detriment. *See, e.g., Pratt* v. *United* States, 129 F.3d 54, 59 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1807 (1998) (petitioner's claim of actual reliance unsupported, and claim of detrimental reliance not objectively reasonable given rigors of *McCleskey* standard); *In re Magwood*, 113 F.3d 1544, 1552-53 (11th Cir. 1997) (petitioner could not have relied on pre-AEDPA standard because claims in second petition were unknown to him when he filed first petition); *Burris* v. *Parke*, 95 F.3d 465, 468 (7th Cir. 1996) (had petitioner foreseen new law, he likely would not have filed one petition challenging conviction and another challenging death penalty, but would have waited and presented all claims at once). Here, petitioner must show that when he filed his first petition he was relying

on the state of the case law at that time concerning abuse of the writ, and that he would not have filed the first petition had he known that any claim of actual innocence in a subsequent petition would have to be proven by clear and convincing evidence, 28 U.S.C. § 2244(b)(2)(B)(ii), rather than under the *Schlup* standard.

It is fantastic for petitioner to claim that he filed his first petition in actual reliance on a belief that, if he later found previously unavailable evidence of actual innocence, he would be able to file a second petition under *McCleskey* and *Schlup*. When he filed the first petition -- jointly with Casale -- arguing that his conviction was invalid, he could not have known that Casale would later, when facing the possibility of parole, confess to the crime. It is simply not believable that he would have withheld his first petition against such an unforeseeable occurrence.

Moreover, petitioner cannot demonstrate that he reasonably relied on the then current abuse of the writ standard when he filed the first petition. At that time, it was already apparent that second or successive habeas petitions were disfavored, and petitioners were well advised to join all available claims in their first petition. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (courts may entertain successive petitions only when "ends of justice" require); *Rose* v. *Lundy*, 455 U.S. 509, 520-21 (1982) (cautioning petitioners to exhaust all claims prior to filing habeas petition and to join all claims in same petition because subsequent petition would be dismissed as abuse of the writ). Indeed, no petitioner can claim justifiable reliance on unchanging rules in habeas cases, particularly with respect to the abuse of the writ doctrine. *See Felker*, 518 U.S. at 664 (referring to the "evolutionary process" of increasing restrictions on successive petitions); *McCleskey*, 499 U.S. at 479-89 (discussing origins and development of abuse of the writ rules).

The instant certiorari petition itself belies petitioner's reliance claim. Petitioner observes that, by enacting the AEDPA, Congress intended to reverse the *Schlup*'s lower standard of proof for actual innocence claims and reinstate the more stringent standard imposed in *Sawyer*. Petition at 12-13. Yet how can petitioner claim reliance on *Schlup*, when the *Sawyer* standard was in effect prior to *Schlup* and closer in time to the filing of his first petition? Because petitioner did not actually, and could not reasonably have relied on pre-AEDPA abuse of the writ standards, the AEDPA standards for second or successive petitions can work no impermissible retroactive effect as to him.

Conclusion

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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